

Guideline Sentencing Update

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Determining the Sentence

Supervised Release

Supreme Court resolves circuit split, holds that supervised release term should not be shortened to give credit for excess time in prison. While in prison, defendant had two of his multiple felony convictions overturned. As a result, his revised sentence was shorter than the time he had already spent in prison. He was released and moved to have his term of supervised release shortened by the excess period of imprisonment. The district court denied the motion, but the Sixth Circuit reversed, holding that “the date of his ‘release’ for purposes of §3624(a) was the date he was entitled to be released rather than the day he walked out the prison door,” and the extra time defendant served in prison should be credited toward his supervised release term. *Johnson v. U.S.*, 154 F.3d 569, 571 (6th Cir. 1998). *Accord U.S. v. Blake*, 88 F.3d 824, 825 (9th Cir. 1996) [9 GSU #1]. *Contra U.S. v. Jeanes*, 150 F.3d 483, 485 (5th Cir. 1998); *U.S. v. Joseph*, 109 F.3d 34, 36–39 (1st Cir. 1997) [9 GSU #7]; *U.S. v. Douglas*, 88 F.3d 533, 534 (8th Cir. 1996) [9 GSU #1].

The Supreme Court unanimously reversed. “On the issue presented for review—whether a term of supervised release begins on the date of actual release from incarceration or on an earlier date due to a mistaken interpretation of federal law—the language of 18 U.S.C. § 3624(e) controls.” That statute “directs that a supervised release term does not commence until an individual ‘is released from imprisonment.’ . . . [T]he ordinary, commonsense meaning of release is to be freed from confinement. To say respondent was released while still imprisoned diminishes the concept the word intends to convey.”

“The phrase ‘on the day the person is released,’ in the second sentence of § 3624(e), suggests a strict temporal interpretation, not some fictitious or constructive earlier time. The statute does not say ‘on the day the person is released or on the earlier day when he should have been released.’ Indeed, the third sentence admonishes that ‘supervised release does not run during any period in which the person is imprisoned.’”

The Court found further support in § 3583(a), “which authorizes the imposition of ‘a term of supervised release after imprisonment.’ This provision, too, is inconsistent with respondent’s contention that confinement and supervised release can run at the same time. The statute’s direction is clear and precise. Release takes place on the day the prisoner in fact is freed from confinement.”

The Court noted that defendant does have other avenues of relief. “The trial court, as it sees fit, may modify

an individual’s conditions of supervised release. 18 U.S.C. § 3583(e)(2). Furthermore, the court may terminate an individual’s supervised release obligations ‘at any time after the expiration of one year . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.’ § 3583(e)(1). Respondent may invoke § 3583(e)(2) in pursuit of relief; and, having completed one year of supervised release, he may also seek relief under § 3583(e)(1).”

U.S. v. Johnson, 120 S. Ct. 1114, 1117–19 (2000).

See *Outline* at V.C.1

Safety Valve

Several circuits examine when “not later than the time of the sentencing hearing” is, along with the effect of previously lying or withholding information. Can a defendant provide an untruthful or incomplete version of his or her offense conduct until just before the sentencing hearing, or even during it, and still qualify for the safety valve reduction under § 5C1.2 and 18 U.S.C. § 3553(f)? The Seventh Circuit reversed a reduction to a defendant who continually lied or withheld information in a presentence interview and at the sentencing hearing. He did not “truthfully provide” all information until three continuances of the sentencing hearing had been granted to allow him to “come clean” after being confronted by the government with evidence that he had lied.

Although the phrase “is somewhat ambiguous,” the appellate court concluded that “not later than the time of the sentencing hearing” in § 5C1.2(5) should be construed to mean “by the time of the commencement of the sentencing hearing,” not during the hearing. “Because the statute requires that the defendant truthfully provide all information ‘to the Government’ rather than to the sentencing court, an interpretation of the safety valve which would allow a defendant to deliberately mislead the government during a presentencing interview and wait until the middle of the sentencing hearing to provide a truthful version to the court runs contrary to the plain language of the statute” and would be inconsistent with its purpose. The court also noted that allowing a defendant to drag out his story can impede the government’s efforts to investigate the involvement of others.

U.S. v. Marin, 144 F.3d 1085, 1091–95 (7th Cir. 1998). See also *U.S. v. Long*, 77 F.3d 1060, 1062–63 (8th Cir. 1996) (defendant who lied in presentence interview and only admitted truth under cross-examination during sentencing hearing did not satisfy § 3553(f)(5)).

The Second Circuit distinguished *Marin* in a case that also involved repeated instances of lying or withholding information. Over the course of almost four years, defendant had been given several opportunities to provide information at proffer sessions with the government, but he either lied or refused to attend. Eventually, defendant twice requested new proffer sessions with the government in order to qualify for the safety valve. The government refused, and defendant ultimately provided a letter to the probation department one month before his sentencing hearing, and an affidavit one day before the hearing, that he claimed contained complete and truthful information about his offense. Without deciding whether the information was indeed truthful, the district court refused to apply the safety valve, holding that a defendant who deliberately provides false information and refuses other chances should not be given a final opportunity to make up for previous lies and omissions.

The appellate court remanded to allow defendant to show that his last proffers were complete and truthful. “[W]e find that appellant complied with subsection five by coming forward ‘not later than the time of the sentencing hearing.’ 18 U.S.C. § 3553(f)(5). The plain words of the statute provide only one deadline for compliance, and appellant met that deadline. Nothing in the statute suggests that a defendant is automatically disqualified if he or she previously lied or withheld information. Indeed, the text provides no basis for distinguishing among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline by disclosing ‘not later than’ sentencing. Similarly, the text provides no basis for distinguishing between defendants who provide the authorities only with truthful information and those who provide false information before finally telling the truth.”

“We agree with *Marin* that the deadline for compliance should be set at the time of the commencement of the sentencing hearing. In essence, however, the government urges us to rely on the policy concerns expressed in *Marin* to move the deadline earlier in time. According to the government, the defendant’s good faith cooperation is to be evaluated, as a whole, from the start of the criminal proceeding. We decline to stretch the meaning of § 3553(f)(5) in such a manner. . . . [W]e are convinced that the concerns identified in *Marin*, and now pressed by the government, are largely theoretical and do not present a significant risk to the integrity of the safety valve so long as the deadline set by *Marin* is enforced.” The court noted that defendant’s behavior “prior to allegedly telling the complete truth will be useful in evaluating whether [his] final proffers were complete and truthful.”

U.S. v. Schreiber, 191 F.3d 103, 106–09 (2d Cir. 1999). See also *U.S. v. Gama-Bastidas*, 142 F.3d 1233, 1243 (10th Cir. 1998) (remanded: because a defendant “may present in-

formation relating to subsection 5 to the government before the sentencing hearing, . . . Defendant’s attempt to furnish information to the court and the government in the Judge’s chambers prior to the sentencing hearing is not ‘too late’”).

The Eleventh Circuit similarly held that it was error to deny consideration of a safety valve reduction for a defendant who waited until the day of his sentencing hearing, a year after his arrest, to finally disclose the source of his cocaine. The court rejected the government’s attempt to require defendants “to disclose all information in good faith,” holding that “[t]he plain language of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 provides only one deadline for compliance, ‘not later than the time of the sentencing hearing.’ . . . It is undisputed that Brownlee met this deadline. Nothing in the statute suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from safety-valve relief. . . . We follow those circuits who have held that lies and omissions do not, as a matter of law, disqualify a defendant from safety-valve relief so long as the defendant makes a complete and truthful proffer not later than the commencement of the sentencing hearing.”

The court agreed with the Second Circuit, however, in warning defendant that “the evidence of his lies becomes ‘part of the total mix of evidence for the district court to consider in evaluating the completeness and truthfulness of the defendant’s proffer.’”

U.S. v. Brownlee, No. 98-2106 (11th Cir. Feb. 29, 2000) (Strom, Sr. Dist. J.).

The Eighth Circuit affirmed a reduction for a defendant who “repeatedly lied to government interviewers about aspects of the offense and did not truthfully cooperate until just before her sentencing hearing.” The court rejected the government’s argument that “we should construe § 3553(f)(5) to prohibit sentencing courts from applying the safety valve to defendants who wait until the last minute to cooperate fully. The government also suggests that § 3553(f)(5) must be denied to those whose tardy or grudging cooperation burdens the government with a need for additional investigation. These factors are expressly relevant to other sentencing determinations, such as the third level of reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b), and substantial assistance motions under U.S.S.G. § 5K1.1. But they are not a precondition to safety valve relief.”

The court distinguished its decision in *Long*, *supra*, which had affirmed a denial of the safety valve reduction for a defendant who only admitted the full truth during cross-examination at her sentencing hearing. “In contrast, Tournier’s full and truthful cooperation, though grudging and fitful, was completed before the sentencing hearing. The two cases may present only a difference in degree, not in kind, but subtle distinctions are important

in fact finding, and they are for the sentencing court, not this court, to draw.”

U.S. v. Tournier, 171 F.3d 645, 647–48 (8th Cir. 1999).

What about the opposite situation, where a defendant is truthful at first but then changes his or her version of events? The Ninth Circuit affirmed a safety valve reduction for a defendant who provided full information concerning his offense shortly after his arrest, but changed his story at his trial and sentencing and denied that he knew he was carrying drugs. Defendant’s “recantation does not diminish the information he earlier provided.” *U.S. v. Shrestha*, 86 F.3d 935, 939–40 (9th Cir. 1996) [8 *GSU* #9]. The court later distinguished *Shrestha* and affirmed the denial of a reduction for a defendant who seemed to tell the truth at first, but then changed his story about the involvement of other individuals in the offense. The court found it significant that “in *Shrestha* the defendant did not recant as to the information he had provided about others involved in the transaction,” and noted that defendant’s “recantation casts doubt on his truthfulness.” *U.S. v. Lopez*, 163 F.3d 1142, 1143–44 (9th Cir. 1998).

In a similar case the Tenth Circuit affirmed a safety valve denial for a defendant who implicated another when he was first interviewed by a DEA agent, then later denied the other individual was involved and disputed the DEA agent’s report on that issue. The appellate court distinguished *Shrestha* as “involv[ing] the need to apply the safety valve statute so as not to interfere with a defendant’s right to testify at trial, a factor not involved in this case,” and noted that *Lopez* affirmed a denial “[o]utside the trial context.”

“Leaving aside the trial testimony question posed by *Shrestha*,” the court held that a defendant who “initially tells the government the whole truth but later recants . . . is no more entitled to safety valve relief than the defendant who never discloses anything about the crime and its participants. In this type of case, if the sentencing court finds that the initial recanted story was truthful, or that in recanting the defendant has been untruthful, the court’s ultimate finding that defendant has not ‘truthfully provided to the Government all information and evidence the defendant has concerning the offense’ is not clearly erroneous.”

U.S. v. Morones, 181 F.3d 888, 890–91 (8th Cir. 1999).

See *Outline* at V.F.2.f

Eleventh Circuit holds that coconspirator’s possession of weapon does not necessarily preclude application of safety valve. Defendant received an enhancement under §2D1.1(b)(1) because a coconspirator owned a shotgun found in one of the marijuana grow houses defendant had worked in. The district court held that defendant therefore could not benefit from the safety valve provision because of §5C1.2(2), which states that a defen-

dant cannot “possess a firearm . . . (or induce another participant to do so) in connection with the offense.” The appellate court reversed, however, based on the language of §5C1.2(2) and Application Note 4.

“Two reasons compel our conclusion that ‘possession’ of a firearm does not include reasonably foreseeable possession of a firearm by co-conspirators. First, the commentary to the pertinent section adds that ‘[c]onsistent with §1B1.3 (Relevant Conduct), the term “defendant,” as used in subdivision (2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.’ U.S.S.G. §5C1.2, comment. (n.4). This commentary, which tracks the language of section 1B1.3(a)(1)(A), implicitly rejects the language of section 1B1.3(a)(1)(B) which holds defendants responsible for ‘all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.’ It is this ‘reasonably foreseeable’ language that allows a defendant to be held responsible for a firearm under section 2D1.1(b)(1) even when he physically possessed no firearm.”

“Second, the plain language of section 5C1.2 requires that the defendant ‘possess a firearm . . . or induce another participant to do so. . . .’ If ‘possession’ in section 5C1.2 encompassed constructive possession by a co-defendant, then ‘induce another participant to [possess]’ would be unnecessary. Mere possession by a co-defendant, therefore, while sufficient to trigger section 2D1.1(b)(1), is insufficient to knock a defendant out of the safety-valve protections of section 5C1.2.”

U.S. v. Clavijo, 165 F.3d 1341, 1343 (11th Cir. 1999) (per curiam). *Accord U.S. v. Wilson*, 114 F.3d 429, 432 (4th Cir. 1997); *In re Sealed Case*, 105 F.3d 1460, 1462–63 (D.C. Cir. 1997) [9 *GSU* #3]; *U.S. v. Wilson*, 105 F.3d 219, 222 (5th Cir. 1997) [9 *GSU* #5]. *Contra U.S. v. Hallum*, 103 F.3d 87, 89–90 (10th Cir. 1996) [9 *GSU* #3].

See *Outline* at V.F.1.c

Adjustments

Vulnerable Victim

Several circuits hold that repeated calls to previously defrauded victims evidences targeting of “vulnerable” victims. In some telemarketing fraud schemes, victims who send money to the telemarketers are retargeted for further fraud, a process sometimes called “reloading.” The Ninth Circuit agreed with the Seventh that because individuals who are defrauded again in the “reloading” process have shown themselves to be “particularly susceptible” to the fraud, defendants merited a §3A1.1 enhancement. “While recognizing that a person involved in a scheme to defraud will usually direct his activities toward those persons most likely to fall victim to the scheme and that not all such defendants will deserve the vulner-

able victim sentence enhancement, . . . we agree with the Seventh Circuit's conclusion in" *U.S. v. Jackson*, 95 F.3d 500 (7th Cir. 1996).

"The 'reloading' scheme at issue here seeks out people who have a track record of falling for fraudulent schemes. As the Seventh Circuit stated, '[w]hether these persons are described as gullible, overly trusting, or just naive, . . . their readiness to fall for the telemarketing rip-off, not once but *twice* . . . demonstrated that their personalities made them vulnerable in a way and to a degree not typical of the general population.' *Jackson*, 95 F.3d at 508 (emphasis in original). Because the victims of this scheme were particularly susceptible, and it is uncontested that [defendant] knew or should have known that the persons 'reloaded' had previously fallen for the scheme, we find that the district court did not clearly err in applying the vulnerable victim enhancement in this case."

U.S. v. Randall, 162 F.3d 557, 560 (9th Cir. 1998). *See also Jackson*, 95 F.3d at 508 (emphasizing that not "all of the victims of the defendants' scheme were unusually vulnerable, just those who were successfully reloaded").

The Sixth Circuit reached the same result for a defendant who purchased "leads lists" of people who were "identified as willing to send in money in the hope of winning a valuable prize. These people were predisposed to the very scam [defendant] was running; indeed, that is why he bought the 'leads lists.' . . . The vulnerability of these people is also evident from the 'reloading' process.

Through the reloading process, those known to have already succumbed to the [fraud] scheme were contacted again and again, thereby further honing the original list. . . . The susceptibility of the victims here was a known quantity from the start, only to be refined into a verified 'suckers' list through the reloading process."

U.S. v. Brawner, 173 F.3d 966, 973 (6th Cir. 1999). *See also U.S. v. Robinson*, 152 F.3d 507, 511–12 (6th Cir. 1998) (affirmed: "when the defendant targeted a person or persons who had been previously victimized four or five times, this amounted to targeting an individual who can be deemed 'particularly susceptible' under Guideline §3A1.1").

The Second Circuit affirmed the enhancement in a scheme that repeatedly targeted elderly victims. "Although being elderly is alone insufficient to render an individual unusually vulnerable, . . . many of the leads given to the sales staff were the names and phone numbers of individuals who previously had done business with a telemarketing company, indicating their susceptibility to criminal conduct that utilizes telemarketing methods. Finally, an important part of the scheme was the reloading process, whereby individuals who already had been victimized by the scheme were contacted up to two more times and defrauded into sending more money to [defendants]."

U.S. v. O'Neil, 118 F.3d 65, 75–76 (2d Cir. 1997).

See Outline at III.A.1.a and d

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